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80-2098

NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

VINCENT COLUCCI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the term "enterprise" as defined by the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* was properly construed by the court of appeals to embrace an illegitimate enterprise consisting simply of individuals associated in fact to commit unlawful acts.

LIST OF PARTIES

Petitioner Vincent Colucci, Michael Clemente, Tino Fiumara, Thomas Buzzanca, Carol Gardner, Michael Copolla and Gerald Swanton were appellants in the United States Court of Appeals for the Second Circuit and co-defendants in the United States District Court for the Southern District of New York.

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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term 1980

VINCENT COLUCCI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Vincent Colucci respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case which affirmed the judgment of conviction entered against him by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. It is set out in full in Appendix A, *infra,* pp.1a-31a. The two opinions of the district court dated October 11, 1979, and July 30, 1979, that relate to the question presented are set out in full in Appendices B (pp. 32a-45a) and C (pp. 46a-52a) *infra,* respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1981. Gerald Swanton's petition for rehearing was denied by the court of appeals on April 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.,* are set forth in Appendix D, *infra.*

STATEMENT OF THE CASE

In what is undoubtedly one of the most expansive applications of the RICO statute seen to date, the indictment in this case, which originally consisted of 213 counts and forfeiture provisions, charged that a total of eighteen persons conspired to " . . . corruptly control and influence the waterfront industry in the Port of New York and other ports in the Eastern United States . . . " by conducting

the affairs of an enterprise " . . . through a pattern of racketeering activity." Despite the breadth of this allegation, and although a unit of the International Longshoremen's Association (ILA) was pleaded as the enterprise in a related case which emanated from the same investigation,[1] no component of the ILA nor of the waterfront industry was alleged to be the enterprise in this case. Instead, the Government alleged that the defendants themselves "associated in fact" and thus constituted the requisite enterprise.

Ultimately, seven defendants, Clemente, Fiumara, Copolla, Buzzanca, Gardner, Swanton, and petitioner Colucci proceeded to trial on a total of 160 counts[2] which, *inter alia,* charged petitioner with Hobbs Act and Landrum-Griffin Act violations.[3] Except for Swanton, who was named only as a co-conspirator, all defendants were charged with substantive and conspiracy RICO violations. The indictment alleged criminal activity over a span of eight years (1970-1978) and the trial itself took approximately three months to complete. Petitioner was convicted and, within days of the jury verdict, was remanded to

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1. *United States v. Scotto,* 641 F. 2d 47 (2d Cir. 1980), *petition for cert. pending* (80-1679).

2. A superseding indictment, and severances with the Government's consent, reduced the scope of the original instrument. In all, petitioner was charged in 12 counts, which included a tax violation.

3. 18 U.S.C. 1951; 29 U.S.C. 186.

custody. Subsequently, he was sentenced to a prison term of five and a half years.[4]

Despite the sprawling criminal combine alleged by the Government, the proof of petitioner's involvement actually was rather narrow. William "Sonny" Montella, Jr., was the Government's principal witness. Montella, a lifelong denizen of the waterfront industry, started as a manual laborer and eventually rose through the ranks of management at several companies that provided stevedoring, lashing, carpentry, or related services to shipping lines operating in the Port of New York. Montella, who himself had been thoroughly involved in illegal activity on the waterfront, became a covert operative for the Government in June, 1978, after he was dramatically and persuasively confronted with substantial evidence of his own activity which had been obtained by federal agents conducting both physical and electronic surveillances. Subsequently, from June, 1978, through December, 1978, Montella met with and recorded conversations he had with several of the defendants.

With regard to petitioner Colucci, Montella testified that he was compelled to pay money to Colucci and his co-defendant Gardner in order to be able to provide services to the Concordia Line.[5] Both Colucci and Gardner were then officials of the ILA. All of Montella's dealings with

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4. The sentences imposed on each defendant are set forth in greater detail in the appendix to the opinion of the Court of Appeals which is fully set forth in Appendix A (pp. 30a-31a, *infra*).

5. Montella also testified that petitioner demanded money from him with regard to his obtaining the Chilean Line as an account, but this did not result in any additional payments.

Colucci in this regard took place in the latter half of 1975 and none of his conversations with Colucci were recorded.[6]

The balance of the evidence concerning Colucci established that in July, 1977, two co-defendants and an unindicted co-conspirator used coded references when discussing Colucci in a telephone conversation and that subsequently Colucci spoke to one of the unindicted co-conspirators about an appointment with an individual neither of them named.[7] Other evidence established that in April, 1978, petitioner and co-defendant Buzzanca had a conversation about the prospect and status of the federal investigation then underway, during which petitioner expressed concern about the impact of prospective government witnesses upon the union and its members. Physical surveillances conducted during the same month established that petitioner met with other co-defendants at the offices of the ILA in Manhattan.

While this evidence arguably became probative when viewed against the backdrop of Montella's testimony, none of it, nor all of it, even approached sufficiency standing alone. The core of the case against Colucci—indeed, the only evidence of actual criminal activity on his part—was Montella's testimony about his meetings and conversations with petitioner during the last six months of 1975.

Despite this limited involvement, evidence involving other defendants over the entire eight-year period was ad-

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6. The opinion of the court of appeals (p. 10a, *infra*) would appear to reflect the transcript of a recorded conversation. Actually, it is an abstract of Montella's testimony at trial.

7. This evidence was obtained by an entirely unrelated electronic surveillance conducted by New Jersey law enforcement officials in 1977.

mitted against Colucci. Thus, for example, Montella's testimony about payoffs he made first to Swanton and then to Clemente from 1970 to 1978 in order to maintain the Netumar Line as an account for companies that employed him was admitted against Colucci. Similarly, the testimony of Netumar officials that they paid approximately $200,000 a year to Clemente for his intervention in negotiations regarding the rental of heavy equipment was introduced against Colucci.

The Government's proof at trial did not establish any rational connection of this and other wide-ranging evidence to Colucci. Indeed, there was not even a contention that Colucci knew of the schemes involving Netumar or of Swanton's existence. Instead, with the RICO statute as a foundation and its interpretation of the word enterprise as the keystone, the Government erected an evidentiary facade and then invoked traditional evidentiary rules of conspiracy and agency to support the admissibility of that evidence against Colucci. The result is a classic example of the Government's continued reliance upon RICO to dress up conspiracies as a means of circumventing the traditional rules governing vicarious liability.

REASONS FOR GRANTING THE PETITION

The extent to which this issue determines the scope of an important federal statute and the conflict among the circuits in attempting to resolve it warrants an interpretation by this Court.

The question presented in this case determines the scope of the RICO statute. It reflects an important and vexatious issue which has produced conflict among the circuits as well as deep divisions within individual panels. Indeed, the significance of this issue was recognized by this Court when it granted certiorari in *United States v. Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,*

__U.S.__, 101 S.Ct. 938 (1981) and heard argument on April 27, 1981. That case is *sub judice.* The issue in this case is the same as that in *Turkette* and until it is resolved by this Court there will continue to be a three-way split among the circuits.

In *Turkette,* the First Circuit held that the provisions of RICO do not apply to individuals who associate in fact only to engage in criminal conduct. In *United States v. Anderson,* 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* __U.S.__, 49 U.S.L.W. 2178 (No. 80-766, 1981) the Eighth Circuit held that the "enterprise" should have an "existence that can be defined apart from the commission of the predicate acts constituting the pattern of 'racketeering activity'." 626 F.2d at 1372. The remainder of the courts of appeals that have considered this question have seized upon the absence of any restrictive word in the statute governing the applicability of the word "enterprise," the presence of the word "any," and concluded that the statute was intended to encompass both "legitimate" and "illegitimate" enterprises within its parameters. Even some of these decisions, however, have generated strong dissenting opinions. *See, e.g., United States v. Altese,* 542 F.2d 104 (2nd Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied,* 429 U.S. 1039 (1977); *United States v. Sutton,* 605 F.2d 260 (6th Cir. 1979), *rev'd en banc,* 642 F.2d 1001 (1980) (Merritt, J., dissenting); *United States v. Grzywacz,* 603 F.2d 682 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied,* __U.S.__, 100 S. Ct. 2152 (1980); *United States v. Aleman,* 609 F.2d 298 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied,* 445 U.S. 946 (1980); *United States v.Rone,* 598 F.2d 564 (9th Cir. 1979) (Ely, J., dissenting), *cert. denied,* 445 U.S. 946 (1980). The extent of this schism has been appreciated by circuit judges on both sides of the issue who have noted that it is properly one to be resolved by this Court. *See, United States v. Sutton, supra,* 642 F.2d at 1055 (Merritt, J., dissenting);

United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), *petition for cert. pending,* No. 80-1247.

This Court has acknowledged that the RICO statute "is a carefully crafted piece of legislation." *Ianelli v. United States,* 420 U.S. 770, 789 (1975). But as it stands now the view of the majority of the circuits requires two different interpretations of the word "enterprise" as used in 18 U.S.C. 1962. Subsection (a) of §1962 prohibits investment in an "enterprise" of capital obtained by racketeering activity. Similarly, subsection (b) prohibits acquisition of an interest in an enterprise by racketeering activity itself. If the "enterprise" is viewed as the entity to be protected by RICO, then subsection (c) would appear to prohibit independent actors from victimizing the enterprise by conducting its affairs through a "pattern of racketeering activity." As read by the majority of the circuits, however, the actors themselves may constitute the enterprise thus transforming it from the object to be protected by the statute to the subject of its prohibitions.

This rather facile switch might readily be tolerated but for three compelling factors. First, it would appear to be contrary to the Congressional purpose in enacting RICO. *United States v. Marubeni America Corp.,* 611 F.2d 763 (9th Cir. 1980).[8] Second, this interpretation works a substantial renovation of the traditional rules governing vicarious liability among co-conspirators,

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8. The remarks of Senators Hruska, Yarborough, Byrd, Thurmond, and McClellan and those of Representatives Poff, Celler, St. Germain, McCullock, Kleppe, Railsback and Anderson reveal a clear Congressional concern to protect legitimate businesses. 116 Cong. Rec. 602, 603, 607, 953, 18940, 35193, 35295, 35196, 35200, 35201, 35206, 35304, 35318-19. See also, McClellan, *The Organized Crime Act* (S. 30) *Or Its Critics: Which Threatens Civil Liberties?* 46 Notre Dame Lawyer 55, 140-46 (1970).

evidentiary aspects of agency, and the limits of joinder. *Compare Kotteakos v. United States,* 328 U.S. 750 (1946) *with United States v. Elliot,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978). And finally, since RICO provides for wholly independent civil actions by those who view themselves as aggrieved by RICO violations, 18 U.S.C. 1964,[9] this Court should determine the scope of the statute's applicability if abuse is to be avoided.[10] At stake is the extent to which this already powerful federal statute will be permitted to intrude in both criminal *and* civil litigation previously thought to be beyond its reach.

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9. See, *e.g. Farmers Bank of State of Del. v. Bell Mtge. Corp.,* 452 F. Supp. 1278 (D.C. Del. 1978); *Barr v. WUI/TAS, Inc.,* 66 F.R.D. 109 (S.D.N.Y. 1975); *King v. Vesco,* 342 F. Supp. 120 (N.D. Cal. 1972).

10. For example, if the owner of a cooperative or condominium unit used his residence on a regular basis to play backgammon or card games for money, and that activity was in violation of state gambling laws, the managing group of the cooperative or condominium could sue in federal court in an effort to obtain forfeiture of the unit. Clearly, RICO was never intended to provide a federal remedy for "landlord-tenant" type disputes, but with any semblance of centralized prosecutorial discretion removed by 18 U.S.C. 1964(c)—and the giddy appreciation in value of such real estate in our cities—such an eviction effort is at least theoretically possible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1981

Appendix A—Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 549, 550, 551, 552 and 553—September Term, 1980
(Argued November 5, 1980 Decided February 26, 1981)
Docket Nos. 80-1261, 80-1263, 80-1271, 80-1273, 80-1275

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL CLEMENTE, TINO FIUMARA, THOMAS BUZZANCA, VINCENT COLUCCI, CAROL GARDNER, MICHAEL COPOLLA and GERALD SWANTON,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge,*
FRIENDLY and MESKILL, *Circuit Judges.*

Appeals from judgments of conviction after a jury trial entered in the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge,* convicting the defendants of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962(c) and (d); the Hobbs Act, 18 U.S.C. §1951; the Taft-Hartley Act, 18 U.S.C. §186(b); the Internal Revenue Code, 26 U.S.C. §§7201 and 7206(1) (1976); and of committing perjury before a grand jury in violation of 18 U.S.C. §1623 (1976).

Affirmed.

Appendix A—Opinion of the United States Court of Appeals

ALAN M. DERSHOWITZ, Cambridge, Massachusetts (Nathan Dershowitz, Jeanne Baker, David Fine, Cambridge, Massachusetts, Of Counsel, Richard Strafter, Holly Skolnick, John Batter, Joann Crispi, Cambridge, Massachusetts, On the Brief), *for Appellant Clemente.*

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MICHAEL S. DEVORKIN, Assistant United States Attorney, New York, New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Daniel H. Bookin, Ruth N. Glushien, Mary Jo White, Assistant United States Attorneys, New York, New York, Of Counsel), *for the United States of America.*

MESKILL, *Circuit Judge:*

This case concerns racketeering activity that has plagued waterfront businesses in New York and New Jersey. Judgments of conviction were entered in the United States District Court for the Southern District of New York after a twelve-week jury trial before Judge Sand. The indictment contained 213 counts, charging the

defendants with engaging in extortion in violation of the Hobbs Act, 18 U.S.C. §1951 (1976); receiving bribes in violation of the Taft-Hartley Act, 29 U.S.C. §186(b) (1976); conducting and conspiring to conduct an enterprise's affairs through a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1962(c) and (d) (1976); evading taxes and filing false tax returns in violation of 26 U.S.C. §§7201 and 7206(1)(1976); and making false declarations before a grand jury in violation of 18 U.S.C. §1623 (1976). A schedule listing the defendants' various convictions and the sentences imposed appears in the appendix.

BACKGROUND

The evidence offered by the government at trial depicted Michael Clemente as the ringleader of a highly organized enterprise that had infiltrated all aspects of waterfront business, including labor, shipping, and ship-servicing. Clemente's specific area of control was identified as the New York waterfront. The evidence described the other defendants as follows: Fiumara acted as the New Jersey waterfront "boss" but was subordinate to Clemente; Copolla was a personal assistant to Fiumara; Gardner and Colucci were presidents of two New Jersey International Longshoremen's Association (ILA) locals and answered directly to Fiumara in connection with their illicit activities; Buzzanca was president of two New York ILA locals and conducted his activities under the supervision of Fiumara; and Swanton, a vice-president of a shipping company in New York, worked closely with Clemente.

The linchpin of the enterprise was its control of the ILA in New York and New Jersey; with this power it was able to extort monies from shipping companies and influence their decisions regarding the allocation of ship-

servicing contracts. The latter influence empowered the enterprise to extort monies from the companies that provided services such as the lashing and carpentry work required in connection with loading and unloading cargo. Only those shipping companies and ship-servicing companies that paid the amounts demanded by the enterprise, or "did the right thing" in the argot of the waterfront, had their ships' cargo loaded and unloaded without interruption or obtained and retained contracts to provide their services. The evidence adduced at trial largely concerned dealings between each of the defendants and the government's principal witness, William Montella, who was employed by several ship-servicing companies during the indictment years.

The Court-Authorized Surveillance

Between August 1977 and March 1978 the government monitored oral conversations through listening devices installed in Montella's offices, which had been authorized by court order pursuant to 18 U.S.C. §§2510-2520 (1976).[1] The intercepted conversations combined with physical surveillance of Montella provided the government with substantial proof of Montella's pattern of monthly deliveries of cash to the defendants Clemente and Buzzanca.[2] Montella was approached by the govern-

1. Six extension orders were issued to continue the surveillance. *See* 18 U.S.C. §2518(5)(1976).

2. Court-authorized listening devices were also planted in Buzzanca's offices between March 1978 and June 1979. Conversations concerning arrangements of meetings between the various defendants and discussions about the extortion of waterfront companies were intercepted.

ment in May 1978 and agreed to cooperate in June of that year.[3] From June through December 1978 Montella met with several of the defendants and successfully recorded sixteen of their meetings.[4]

Additionally, several consensual recordings made in the course of an independent New Jersey state investigation were admitted into evidence. In one conversation Fiumara promised a New Jersey undercover officer certain waterfront business and, in another, Copolla described Fiumara's waterfront control and Copolla's own role as Fiumara's assistant.

The Netumar Account

From 1970 to 1972 New Jersey Export Co. (N.J. Export) served as the carpentry contractor for Netumar Steamship Line (Netumar), which operated from Pier 36 in Manhattan. At that time, Montella was the general foreman for N.J. Export. Montella testified that beginning in 1970 or 1971 defendant Swanton, then a vice-president of Netumar, threatened that unless Montella agreed to "do the right thing" Swanton would "throw them out" and find another company that would make the payoffs demanded. Swanton informed Montella that he was associated with Clemente, who was the behind-the-scenes boss who ran the East River Piers in Manhattan, and that some of the kickback money would be given to Clemente. When Montella asked Swanton how he was expected to raise the cash to make the payoffs, Swanton instructed him to inflate his materials bills. Montella agreed to make the payoffs and admitted that he later kept some of the money generated in this manner for himself.

3. Montella agreed to plead guilty to two five-year felonies of conspiracy and one five-year felony for tax evasion.

4. During these meetings Montella used government funds to pay Clemente $7,000, Fiumara $4,000, Buzzanca $13,000, and Gardner $1,000.

When Montella left N.J. Export to join a Brooklyn-based company, C.C. Lumber Co., he asked Swanton whether his new employer could obtain the Netumar account. Swanton denied the request, asserting as his reason Clemente's dislike for Anthony Scotto, the Brooklyn ILA local president.

In June 1973 Montella left C.C. Lumber and joined Quin Lumber, another Brooklyn-based carpentry and lashing company. Quin Lumber's employees, like those of C.C. Lumber Co., belonged to the ILA Brooklyn local run by Anthony Scotto. In early 1974 Swanton called Montella and advised him that Clemente had resolved his differences with Scotto and that, therefore, Montella's Brooklyn employer could now obtain the Netumar account. Thereafter, they arranged a meeting where Swanton told him: "Listen . . . go to the Shelton Health Club. Ask for Mike C. Give him 500. Give him 500 a month. . . . Give him 500 and make him happy." Montella testified that shortly thereafter he met Clemente at the Shelton Health Club, where the following exchange took place:

> MONTELLA: Mike, I'm Sonny [Montella]. Gerry [Swanton] told me to come down. I'm with Quin Lumber and I'm going to be doing the carpentry work down there.
>
> CLEMENTE: I hope you do the right thing. I hope you are not cheap.
>
> MONTELLA: I'm going to give you 500 a month.
>
> CLEMENTE: Okay. If you have any problems down there . . . let me know. Go out and make money.

Montella testified that some time in April or May 1974 he returned to the Shelton Health Club and handed Clemente $500 in cash in a white envelope. Thereafter, Montella delivered $500 in the same manner once a month through

December 1976. Montella testified that he continued to make the payments because he feared that if he stopped he would lose the Netumar account.

In 1976 Montella placed a bid with Netumar for the contract to perform the lashing work in addition to the carpentry services his company already was providing. When Montella's bid was rejected, he approached Clemente for assistance. Clemente gave Montella instructions; Montella followed them and was subsequently awarded the lashing contract with Netumar. Later, Clemente asked for another $500 per month and Montella acquiesced. Thereafter, from January 1977 through December 1978 Montella paid Clemente $1,000 in cash at their monthly meetings at the Shelton Health Club.

During the same period in which Clemente was receiving payoffs from Montella, he had also arranged to receive $200,000 per year from Netumar itself. When Netumar began its operations at Pier 36 in Manhattan, it believed that it was being grossly overcharged by its stevedore, United Terminals, Inc. (United). Charles Mattman, Netumar's president, approached officials of United and attempted to negotiate a reduction of the $800,000 annual equipment rental fee it was paying or to buy the equipment outright. United offered to sell the equipment for $1 million, a price considered excessive by Mattman. Mattman then approached Clemente for assistance. Clemente offered to intervene provided that Mattman agreed to pay him 25 cents for each dollar Clemente saved Netumar. Following Clemente's intervention United sold the equipment for $300,000. Thereafter Netumar paid Clemente $200,000 in quarterly cash installments each year. Netumar made these payments from 1973 through 1978 in restaurants in Brooklyn and Manhattan.

The Concordia Line Account

In June 1975 another shipping company, the Concordia Line, decided to move its operation from Hoboken, New Jersey, to Newark. Castelo and Sons Ship Servicing Co., which had been providing the lashing work for Concordia in Hoboken about this time, was approached by defendant Carol Gardner, the president of the black ILA local in Newark. Gardner advised Manuel Castelo and Joseph Castelo, Jr. that they would have to pay him certain amounts of money to retain the Concordia account once it moved to Newark. The Castelos, who were friends of Montella, informed him about Gardner's demands.

Montella subsequently contacted Gardner and inquired about the Concordia Line account. Gardner told Montella to meet him and his "partner," defendant Vincent Colucci, in Miami to discuss the matter. Colucci was then president of the white ILA local in Newark. Montella met with Gardner in Miami but did not reach a final agreement. They continued their discussions in New York, where Montella ultimately agreed to pay Gardner and Colucci $10,000 cash up front and $2,000 cash each month for the Concordia Line account. Montella also agreed to pay secretly to Gardner an additional $10,000 cash and promised not to disclose this clandestine payment to anyone, including Colucci. In August 1975 Montella met with Gardner and handed him $20,000 in cash. In September 1975 Montella was advised by a Concordia Line official what rates to bid and shortly thereafter was awarded the contract.

Although it had been agreed that Gardner and Colucci would share Montella's $2,000 monthly payoffs, Montella soon began to receive separate demands for the money from each of them. Each month Montella paid Gardner but, nevertheless, received an additional demand from Colucci. Montella arranged a meeting among the

three of them to attempt to straighten out the problem, but the meeting achieved less than satisfactory results.

Afraid that he would continue to be "double-banged," as he later termed it, by Gardner and Colucci, Montella arranged a meeting with Clemente to seek his assistance. Montella met with Clemente at the Shelton Health Club in December 1975 and explained the situation to him. Clemente informed Montella that had he approached him initially he could have avoided paying any money to Colucci and Gardner. Clemente admonished Montella, however, that "[n]ow you made a commitment you got to live up to it." Although Clemente insisted that Montella live up to his "commitment," he advised him to see the defendant Buzzanca and "tell him you are with me and tell him the story."

Subsequently, Montella adventitiously met Clemente and Buzzanca at a restaurant in Brooklyn. Clemente introduced Montella to Buzzanca and requested that he recount his story to Buzzanca. Buzzanca apologized to Clemente for the trouble that Montella had experienced and promised to clear up the problem. Buzzanca told Montella to make the monthly payments directly to him in the future. When Gardner and Colucci next called him, Montella informed them that he had been instructed not to make his monthly payoffs to them any longer and that they would be receiving instructions as well. Montella did not again hear from Gardner or Colucci in connection with this matter.

Montella complied with Buzzanca's directions and paid him $2,000 cash at Buzzanca's office. The first payment was made in the presence of defendant Fiumara, whom Buzzanca had asked to listen to another rendition of Montella's Concordia story. Montella continued to deliver the $2,000 cash payments to Buzzanca at his office

or in the men's room of a New York restaurant.[5] Montella testified that the payments he made to Buzzanca were handed over to Buzzanca's boss, defendant Fiumara. The payments continued through December 1978 when Fiumara himself picked up a $2,000 payment.

The Chilean Line Account

In 1975, during the same period in which Gardner and Colucci succeeded in coercing Montella to pay $2,000 per month for the Concordia Line account, they advised Montella that unless he paid them an additional $2,000 per month he would lose his account with the Chilean Line. Montella protested that he had obtained the Chilean account many years before in Brooklyn, and that it would be unfair to demand cash from him to retain it. Gardner replied, "Wrong, that's my account," and advised Montella that to retain the account he had to pay the amount they were demanding. Montella testified that the following dialogue ensued:

> MONTELLA: I got to get out? Just like that I got to get out?
>
> GARDNER: That's it.
>
> COLUCCI: That's it.
>
> MONTELLA: First I buy the Concordia Line and now all of a sudden I am getting thrown out of the Chilean Line.
>
> GARDNER & COLUCCI: That's what the boss said, the boss wants you out.

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5. On several occasions Fiumara's assistant, Coppola, came by Montella's offices and picked up the payoff money. On one occasion Laurence Ricci, another assistant to Fiumara, picked up a payment at Montella's offices.

MONTELLA: The boss, who is the boss? I thought you were the boss.

GARDNER: You don't know who the boss is?

MONTELLA: No.

GARDNER: T is the boss.

Montella testified that "T" was the defendant, Tino Fiumara. Montella subsequently advised the vice-president of the Chilean Line that he would no longer "do his vessels in the Port of New Jersey . . . because it was just a little too expensive . . . to do his business."

Clemente and Fiumara—The Bosses of the Enterprise

The government introduced tape recordings of conversations in which several of the defendants professed their loyalty to defendant Fiumara and recognized his authority over them. Buzzanca, for example, stated on one occasion:

> Tino's good point is that everybody fears and respects him. That's a good thing . . .
>
> * * *
>
> I love Tino and I would do anything in the world . . .
>
> * * *
>
> I love him. I love him. And I got to. Ya know like, and I live with him everyday. I absolutely think, if this guy tempers himself, he'll be, ten years from now, he'll be awesome . . . . He'll have the best of two worlds. Good sense, good judgment. Plus, which we all live under fears. Ya need to have that balance . . . [W]e'll make money. We'll steal it, if we have to.
>
> * * *
>
> Somehow I get in fact, I notice in Tino and more than Mike. I come from the greatest guy in the world.

On another occasion, the following statement was made by defendant Gardner concerning defendant Fiumara:

I don't make no move until I, you know, check with, I do the right . . . . I don't have the last decision.

I say I'm very loyal to this guy.

Additionally, the government offered evidence of numerous instances in which Fiumara coordinated activities and meetings among Copolla, Buzzanca, Colucci, and Gardner.

Fiumara's authority on the waterfront, however, was not supreme. The government introduced a great deal of evidence demonstrating that Fiumara was subordinate to Clemente. For example, Clemente's handling of Montella's problems with Gardner and Colucci, who answered directly to Fiumara, demonstrated Clemente's power to control Fiumara's subordinates, and thus Fiumara. Additionally, in 1978 Clemente was able to arrange increased business for Montella on the New Jersey waterfront, Fiumara's territory, illustrating Clemente's commanding position in the enterprise. After Fiumara acceded to Clemente's request that Montella be given more business, Clemente boasted that "Tino give me some satisfaction." Finally, Clemente took steps to protect the enterprise from investigations, evincing his patriarchal role. For example, the government introduced evidence that Clemente obtained a secret New York Waterfront Commission document containing information about federal electronic surveillance of Montella, Buzzanca, Gardner, Colucci, and others.

The Defendants' Case

Of the defendants, only Gardner and Swanton testified. Gardner denied all of the allegations that had been asserted against him and stated that he was the victim of a racially motivated conspiracy by the government against blacks. Swanton also contested the charges brought against him and testified that, contrary to his own

previous grand jury testimony, he had not possessed the power to choose the carpentry and lashing contractors for Netumar. He testified that he did not believe that Clemente had any influence on Pier 36 in Manhattan.

I.

The Hobbs Act Counts

Defendant Clemente asserts that his convictions for extortion, in violation of the Hobbs Act, 18 U.S.C. §1951 (1976), require reversal because the district court's charge was incorrect and because, in any event, insufficient evidence was introduced to sustain them. We conclude that both of these arguments are meritless.

Section 1951 provides in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts to conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"Extortion" is defined in the Hobbs Act as

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1951(b)(2). Clemente's principal contention with respect to the court's charge on the extortion counts is that the trial court improperly charged the jury on the element of wrongfulness

Extortion, as defined in the Hobbs Act, consists of the use of wrongful means to achieve a wrongful objective. *United States v. Enmons,* 410 U.S. 396 (1973). The Supreme Court's decision in *Enmons* teaches that the ap-

plicability of the Hobbs Act to cases such as the one before us depends on whether the statutorily identified means ("actual or threatened force, violence, or fear") have been put to "wrongful use," *i.e.*, have been employed to obtain property to which "the alleged extortionist has no lawful claim." *United States v. Enmons, supra,* 410 U.S. at 400.[6]

The trial court charged the jury on the elements of extortion as follows:

> First, what is an "extortion"?
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force of fear.
>
> * * *
>
> Now, we have said that the word "extortion" means the obtaining of property from another, with his consent induced by the wrongful use of actual or threatened force or fear. In this case, the government contends that property was obtained through threats and fear of economic loss.
>
> * * *
>
> In the context of the statute with which we are concerned, . . . fear means that the alleged victim of the charged extortion feared possible financial injury caused by interference with the right to solicit and obtain business or with the right to retain work.
>
> * * *

---

6. In *Enmons*, the Court held that the Hobbs Act has no application to cases involving "the use of violence to achieve legitimate union objectives." 410 U.S. at 400. Specifically, the Court declared that where the objective is higher wages in return for "genuine" services, the Hobbs Act is inapplicable, notwithstanding that violence has been used to exact such higher wages. The Court emphasized, however, that cases involving the use of the statutorily proscribed means to obtain "imposed, unwanted, superfluous and fictitious services" do come within the purview of the Hobbs Act.

> Let me explain to you how the word "wrongful" applies to your consideration of these counts.
>
> "Wrongful" means that in order for you to find that any of the acts of extortion alleged in these counts were, in fact, committed, you must find beyond a reasonable doubt that the defendant or defendants you are considering had no lawful right to the property obtained, and that the property was obtained because of the victim's fear of economic loss.
>
> * * *
>
> If you find that threats were made or that fear was reasonably aroused, and if you find that the purpose of the defendant you are considering was to obtain money for himself or others to which they were not entitled, then I instruct you that the element of wrongfulness has been established.

Clemente insists that, in view of the court's charge, the jury could have convicted him solely upon finding that he used fear of economic loss to obtain money from Montella. He contends that the use of fear of economic loss is not inherently wrongful, but rather represents a device routinely used in legitimate business transactions, and claims that merely using fear of economic loss to obtain money does not render the receipt of such money wrongful. Thus, he asserts that the requirement set forth by the Supreme Court in *Enmons,* that both the "means" and the "objective" be wrongful to constitute extortion within the meaning of the Hobbs Act, *see* 410 U.S. at 400, was not adequately conveyed to the jury by the district court's charge.

We are satisfied that the charge correctly instructed the jury on the wrongfulness element of the crime of extortion. The thrust of the district court's charge when read as a whole, *see Cupp v. Naughton,* 414 U.S. 141, 146-47 (1973), was that the use of fear of economic loss to obtain property to which one is not entitled is wrongful. It is ob-

vious that the use of fear of financial injury is not inherently wrongful. And precisely because of this fact, the "objective" of the party employing fear of economic loss will have a bearing on the lawfulness of its use. In this regard, Judge Sand instructed the jury that the wrongfulness element of the crime would be satisfied upon finding that fear of economic loss was employed by the defendants to obtain money to which they were not lawfully entitled.

Defendant Clemente interprets *Enmons* as limiting the scope of the Hobbs Act to embrace only those cases in which the means and the objective of the alleged extortionist, when viewed *apart* from each other are each wrongful. While this interpretation of the Hobbs Act may be applicable to cases concerning union demands for higher wages, at least one Circuit has questioned whether the Supreme Court's decision in *Enmons* requires that the statute be so strictly construed in other contexts. *See United States v. Cerilli,* 603 F.2d 415, 420 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980). In *Cerilli,* a case involving lessors of road maintenance machinery who were forced to make political contributions to obtain contracts with a municipality, the Third Circuit determined that the "manner" in which the property is obtained has a bearing on whether the objective, "obtaining the property from another," is legitimate. In other words, the Third Circuit declined to evaluate the "objective" of the defendants in a vacuum, independent of the conduct involved.

The converse situation exists in this case. Fear of economic loss is not an inherently wrongful means; however, when employed to achieve a wrongful purpose, its "use" is wrongful.

Nor do we agree with Clemente that the court's charge on extortion was improper because it would embrace a broad spectrum of legitimate business transactions. Judge Sand specifically instructed the jury that the Hobbs Act

> does not prohibit any person from using his position of-power or influence to obtain legitimate economic ends. The obtaining of money by one who is functioning as a salesman or a broker for the successful solicitation or referral of business, or for use of his influence, good will, or advice, does not in and of itself constitute extortion unless you find that the payment of such monies was induced by wrongful threat or fear of economic loss.

This instruction insured that the jury would distinguish the influence peddler who is lawfully entitled to receive compensation for his legitimate services from persons such as Clemente who exact tribute from their victims in exchange for agreements either to exercise or refrain from exercising the corrupt influence they have acquired.

We conclude, therefore, that the charge was legally sufficient. *See generally United States v Brecht,* 540 F.2d 45, 52 (2d Cir. 1976), *cert. denied,* 429 U.S. 1123 (1977); *United States v. Tolub,* 309 F.2d 286 (2d Cir. 1962).

Clemente also attacks the sufficiency of the evidence admitted against him in connection with the Hobbs Act violations. The verdict of a jury must be sustained "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States,* 315 U.S. 60, 80 (1942); *accord, Hamling v. United States,* 418 U.S. 87, 124 (1974). We are satisfied that the government introduced ample proof to demonstrate convincingly that Clemente had no lawful claim to the monies he obtained from Montella. The government established that Clemente's influence with Netumar depended upon his power to call for work stoppages unrelated to any bona fide labor dispute and his willingness to exercise that power for his own personal benefit. Moreover, the circumstances surrounding the actual payoffs, such as the clandestine meetings in secluded areas arranged by Clemente to conduct those transactions, clearly reflect their illicit nature.

Montella testified that Clemente made numerous statements during those meetings concerning his power over the waterfront industry. Clemente explained how the enterprise functioned and told Montella which ILA officials were under his control. Clemente boasted, for example, that he had had great influence in the appointment of Fred Feld [sic] as General Organizer of the ILA and that he was grooming Scotto to be Feld's [sic] successor. Montella testified that Clemente's statements to him convinced him that Clemente was the power behind the Manhattan piers and that, therefore, he could easily take the Netumar account away from him if he chose to do so. Moreover, other proof of Clemente's guilty state of mind was introduced at trial. For example, when Clemente learned of a pending waterfront investigation, he admonished Montella never to use his name on the telephone and not to arouse suspicion. On another occasion, Clemente advised Montella that he knew that certain ILA officials would be indicted for extortion and tax evasion; Clemente went so far as to arrange a meeting with Montella and Anthony Scotto to discuss the threat the waterfront investigation was posing to their conspiracy. Finally, in June 1978 Clemente advised Montella that if anyone, including Scotto, betrayed him, "His life won't be worth two cents. In twenty-four hours he'll be gone."

Here, the defendants used fear of economic loss to obtain money to which they had no lawful claim. Notwithstanding defendant Clemente's argument to the contrary, it is clear that a wrongful purpose, obtaining money to which they had no lawful claim, was the aim of the defendants. Thus, the utilization of fear of economic loss to achieve that goal was wrongful. This being the case, the wrongful means and wrongful use elements of the crime of extortion were met.

Swanton's Aiding and Abetting Convictions

Defendant Swanton was convicted on 56 counts of aiding and abetting Clemente's extortion of payoff money from Montella between April 1974 and December 1978. Swanton contends that the district court's charge concerning these counts was improper. Additionally, Swanton attacks the sufficiency of the evidence. We conclude that neither of these challenges has any merit.

To aid and abet the commission of a crime, a defendant must "in some sort associate himself with the venture, . . . participate in it as something that he wishes to bring about, [and] seek by his action to make it succeed." *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir. 1938); *see generally Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949); *United States v. Stanchich,* 550 F.2d 1294, 1300 (2d Cir. 1977); *United States v. Mariani,* 539 F.2d 915, 919 (2d Cir. 1976); *United States v. Garguilo,* 310 F.2d 249, 252-53 (2d Cir. 1962).

Paraphrasing Judge Learned Hand's language in *Peoni,* the district court charged the jury:

> First, as you no doubt recall from my previous remarks, in order to find that a defendant was an aider and abettor, you must find beyond a reasonable doubt that he had an interest in the crime charged, that is, that he in some way knowingly associated himself with the criminal act alleged, that he participated in it as something he wished to bring about, that he sought by his action to make it succeed.
>
> In your deliberations as to whether Mr. Swanton aided and abetted in these counts, you must consider whether the evidence demonstrates beyond a reasonable doubt that he participated in it as something that he wished to bring about, *that he sought by his action to make it succeed with respect to each payment alleged in each count*—the $500 a month payment from April 1974 through December 1976, and the $1,000 a month payments from January 1977 through December 1978.

* * *

> If you find, however, that the scheme we are discussing in fact existed but that Mr. Swanton at some point affirmatively disassociated himself from it, then you may not consider against him the acts and the declarations of other participants in the scheme after that date. (Emphasis added).

Swanton claims, citing *United States v. Garguilo,* 310 F.2d 249 (2d Cir. 1962), that the district court's charge was too general; he argues that the jury should have been instructed that Swanton's introduction of Montella to Clemente in April 1974 alone could not be the basis of liability under the *Peoni* standard and the facts of the present case. The *Garguilo* case, however, is readily distinguishable from the one at bar. In *Garguilo,* a case involving counterfeiting, the evidence against the defendant Macchia consisted solely of testimony about his "presence" at a few sessions in which the defendant Garguilo practiced his art or attempted to prepare a counterfeit plate. Because the trial court in the course of its charge never told the jurors "in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime," *United States v. Garguilo, supra,* 310 F.2d at 254, this Court reversed and remanded the case for a new trial. Here, however, the jury was "plainly" charged that a conviction of Swanton for aiding and abetting Clemente required that they find that Swanton "sought by his action to make [the scheme] succeed with respect to each payment alleged in each count." Plainer language concerning Swanton's purposiveness could hardly have been delivered.

Swanton also argues that insufficient evidence to support his conviction for aiding and abetting Clemente was introduced at trial. He contends that merely introducing

Montella to Clemente in April 1974, in connection with the Netumar account, could hardly serve as a sufficient factual predicate for imposing criminal liability for the payoffs to Clemente during the following four and one-half years. Moreover, Swanton claims that the fact that he did not receive any benefit from the transactions he facilitated between Clemente and Montella illustrates that he had no interest in seeing that the venture succeed. But whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act. *See United States v. Green,* 350 U.S. 415, 420 (1956); *United States v. Cerilli,* 603 F.2d 415 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980); *United States v. Trotta,* 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), *cert. denied,* 425 U.S. 971 (1976); *United States v. Provenzano,* 334 F.2d 678, 686 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964). Rather, the controlling issue here is whether sufficient evidence was introduced at trial for the jury to conclude that Swanton purposively sought to make the kickback scheme succeed. This might have been a close question had the government not introduced evidence of Swanton's history of similar extortionate acts involving the same parties. Around 1970 or 1971, when Montella was employed by N. J. Export and was servicing the Netumar Line, Swanton had demanded that Montella kickback monies to him to retain the account. Thus in 1974, when Swanton contacted Montella, who at the time was employed by Quin Lumber, and instructed him to pay Clemente $500 per month to regain the Netumar account, the jury was entitled to infer that Swanton intended to create a scheme similar to the one in which he had actively participated a few years before.

II.

Clemente's Taft-Hartley Convictions

Clemente was convicted on 35 counts of aiding and abetting the receipt of money by Buzzanca, a labor official. Clemente claims that there was a variance between the crimes charged in his indictment and those for which he was convicted. Specifically, Clemente contends that while the indictment charged him with aiding and abetting the *receipt* of illegal labor payments, in violation of 29 U.S.C. § 186(b) (1976), the proof at trial demonstrated, if anything, that he aided and abetted the *making* of those illegal payments, in violation of 29 U.S.C. § 186(a) (1976). We conclude that in light of the great quantity of proof introduced by the government concerning the key role that payoffs to union leaders played in the overall scheme of the criminal enterprise, the limited direct proof of Clemente's purposiveness in assisting Buzzanca's illegal receipt of the monies was sufficient to support Clemente's conviction on these counts.

It is clear from the record that Clemente facilitated the arrangement between Montella and Buzzanca. Montella informed Clemente in 1975 about the trouble he was experiencing in connection with his payoffs to Gardner and Colucci concerning the Concordia Line account. Clemente advised Montella that he would have to live up to the commitment he made, but that he should "go see this kid Tommy Buzzanca, tell him you are with me and tell him the story." Shortly thereafter, Clemente introduced Montella to Buzzanca at an unplanned rendezvous in Ponte's restaurant in lower Manhattan. At Ponte's, Buzzanca assured Clemente that "I'll take care of it from here," and told Montella in Clemente's presence to "see me in my office every month. Don't see them [Gardner and Colucci] anymore." Thus, the record shows that Clemente assisted both parties to the transaction.

At trial Judge Sand charged the jury that "the government contends that the defendants Clemente, Fiumara and Coppola aided and abetted the defendant Buzzanca, a labor official, to request, demand or receive payments from Mr. Montella." While the proof adduced at trial might have made a stronger case against Clemente for aiding and abetting Montella's making the payoffs as opposed to Buzzanca's receiving them, we are satisfied that the evidence is sufficient to sustain Clemente's conviction for the latter. The government correctly observes that there is no authority for the "proposition that a defendant who aids and abets both parties to an illegal transaction cannot be convicted for aiding and abetting both." All of the authorities cited by Clemente are simply inapposite.

III.

The RICO Counts

Defendants Clemente, Fiumara, Buzzanca, Colucci, and Gardner, were convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962(c)(1976), and conspiring to violate that statute, 18 U.S.C. §1962(d) (1976). Defendant Coppola was convicted of conspiring to violate RICO. All of the defendants claim that the enterprise charged in the indictment, a "group of individuals associated in fact" having no legitimate purpose, is outside the scope of the term "enterprise" as it is employed in RICO. *See* 18 U.S.C. § 1961(4) (1976). Additionally, the defendants claim that the RICO conspiracy count against each of them is unconstitutionally vague. We reject both of these contentions. In *United States v. Altese,* 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977), we held that the term "enterprise" embraces both legitimate and illegitimate enterprises. This Court recently adhered to the position

taken in *Altese* in *United States v. Errico,* slip op. 423, 430 (2d Cir. Dec. 1, 1980), and *United States v. Mannino,* slip op. 333, 348 (2d Cir. Nov. 18, 1980). Since our decisions in *Errico* and *Mannino,* in which we noted the split of authority on this issue, the Sixth Circuit reached a result in line with *Altese* in an *in banc* decision in *United States v. Sutton,* Nos. 78-5134-39, 78-5141-43 (6th Cir. Dec. 3, 1980), *rev'g United States v. Sutton,* 605 F.2d 260 (6th Cir. 1979). Only the First and Eighth Circuits have adopted a contrary view. *See United States v. Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,* 49 U.S.L.W. 3525 (U.S. Jan. 27, 1981); *United States v Anderson,* 626 F.2d 1358 (8th Cir. 1980). Although we decline this opportunity to review our position taken in *Altese,* we note in passing that the purpose of the "enterprise" here was the establishment of a pattern of racketeering activity in a legitimate business, the waterfront industry.[7]

Defendants claim that since the enterprise charged in the indictment, an association in fact, was itself a conspiracy, a charge that the defendants conspired to create the enterprise is unintelligible. We agree with the Fifth Circuit which squarely confronted and rejected this contention in *United States v. Diecidue,* 603 F.2d 535 (5th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980):

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7. In a case strikingly similar to the one at bar that also involved waterfront corruption, the Third Circuit cogently stated:

> The purpose of RICO—prevention of infiltration of legitimate business by racketeers—would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses . . . . We decline in this case to construe the RICO statute so as to allow the appellants a defense that they made sure *not* to engage in any *legal* activity.

United States v. Provenzano, 620 F.2d 985, 993 (3d Cir. 1980) (emphasis in original).

> We conclude that Count One of the indictment properly charged a conspiracy to conduct the affairs of a §1961(4) enterprise through racketeering activities, the nature of which was precisely stated, and adequately informed defendants that the enterprise whose affairs they conspired to conduct was one which they, by their association, had formed. *See United States v. Hawes,* 529 F.2d 472, 479 (5th Cir. 1976). That the formation of the enterprise and the conception of the conspiracy may have occurred simultaneously in no way detracts from the Act's applicability.

603 F.2d at 545-46.

Finally, the defendants claim that the district court's charge to the jury concerning the RICO conspiracy counts was improper. The defendants, however, failed to object to this portion of the court's charge and thus waived any objection they may have had in this regard. Fed. R. Crim. P. 30. *See, e.g., Henderson v. Kibbe,* 431 U.S. 145, 154 (1977); *United States v. Vila,* 599 F.2d 21, 25 (2d Cir.), *cert. denied,* 444 U.S. 837 (1979) (alternate holding); 8A J. Moore Federal Practice Par. 30.04 (2d ed. 1980).

IV.

Defendant Gardner's Cross-Examination

Defendant Gardner claims that he was unfairly cross-examined and that his previous Taft-Hartley conviction was improperly admitted at trial.

Gardner testified on direct examination that he had never received any payoff money from Montella; that hundreds of thousands of dollars of loans accounted for in his possession of large sums of money in the indictment years; that he received no loans as a result of his ILA position; and that his prosecution was racially motivated. On

cross-examination the government sought to establish that Gardner deliberately burned his personal and business financial records shortly after receiving a subpoena for their production, and that some of his loans were received as a result of his ILA position. Gardner was questioned about having filed false loan applications, and three of these applications were admitted into evidence. Additionally, after questioning Gardner about checks he had purportedly received from waterfront employers for charitable affairs, the government established that the "charities" were frauds and that Gardner had kept the monies for himself. Finally, after Gardner denied that he had received any loans by reason of his union position, the government was permitted to prove that Gardner was convicted for receiving such a loan from a waterfront businessman in 1979.

The defendant contends that Judge Sand failed to consider the prejudicial effect of the impeachment evidence used against him pursuant to Rule 403 of the Federal Rules of Evidence.[8] We are satisfied, however, that Judge Sand did not abuse the broad discretion afforded to him under Rule 403. *See generally United States v. Benedetto,* 571 F.2d 1246, 1251 (2d Cir. 1978); *United States v. King,* 560 F.2d 122, 128 (2d Cir.) *cert. denied,* 434 U.S. 925 (1977). The government's impeachment of Gardner fell into three general categories: (1) inquiries into conduct of the defendant that bore on his character for truthfulness, (2) extrinsic evidence of specific acts, and (3) evidence of a prior conviction. The first two categories fall

8. Fed. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

within Rule 608(b)[9] of the Federal Rules of Evidence, the third within Rule 609(a).[10]

We conclude that the court did not abuse its discretion in allowing the government to inquire into the destruction of Gardner's personal and business records. *See United States v. Graham,* 102 F.2d 436, 442 (2d Cir.)., *cert. denied,* 307 U.S. 643 (1939). The evidence was indisputably relevant to and probative of Gardner's untruthfulness. Likewise, the government's inquiry into

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9. Fed. Rev. Evid. 608(b) provides:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

10. Fed. R. Evid. 609(a) provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Gardner's loan transactions was entirely proper. Gardner had injected the subject into the case in his direct testimony, and the government was entitled to pursue the subject on cross-examination. *United States v. Hockridge*, 573 F.2d 752, 761 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978); *United States v. Benedetto, supra*, 571 F.2d at 1250-51. Similarly, the government's inquiries on cross-examination into Gardner's acceptance of checks from Montella and others for the purported charitable affairs were permissible to refute Gardner's direct testimony that he had never taken money for illicit reasons from Montella. We are thus satisfied that the government's inquiries on cross-examination were permissible under Rule 608(b).

The admission of the fraudulent loan applications, however, is another matter. Rule 608(b) explicitly provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking his credibility . . . may not be proved by extrinsic evidence." Even assuming, however, that the loan applications were improperly admitted to prove facts collateral to the charges in the indictment, in view of the substantial evidence introduced against Gardner,[11] we are convinced that any error in their admission was harmless.

Gardner's complaint that his prior conviction should not have been admitted under Rule 609(a) simply does not withstand analysis. The evidence of his conviction was not admitted until Gardner denied the facts underlying the conviction. Moreover, Gardner actually requested that it be admitted. The record reveals that Judge Sand bent over

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11. Three different employees testified that they personally paid Gardner $200,000 in illegal cash payoffs, and the testimony of three other eyewitnesses corroborated these payoffs. And finally, a tape recording in which Gardner admitted receiving the illegal cash payments was introduced.

backwards to guard defendant Gardner from being unduly prejudiced. Following Gardner's first denial of the facts underlying his previous conviction, Judge Sand gave him another "chance" to testify truthfully before permitting the government to impeach him with evidence of the conviction.

We hav carefully considered all of the defendants' other contentions and find them to be without merit. Accordingly, the judgments of conviction are affirmed.

Appendix A—Opinion of the United States Court of Appeals

APPENDIX

Defendant (Total Prison Term; Total Fine, Total Counts)	Counts	Charge	Term of Imprisonment	Fine
MICHAEL CLEMENTE (20 years; $50,000; 103 cts.)	1	RICO	20 years	$25,000
	2	RICO Consp.	20 years	
	49-83	Labor payments	6 mo. each other; conc. to Cts. 1 & 2)	
	87-142	Extortion	20 years each	
	200, 202, 204, 206 208	Tax evasion	4 years each (consec. to each other; conc. to all others)	$5,000 each
	201, 203, 205, 207, 209	Filing False Tax returns	3 years each (consec. to each other; conc. to all others)	
TINO FIUMARA (25 years; $10,000; 74 cts.)	1	RICO	20 years	
	2	RICO Consp.	5 years	$10,000
	14-48	Extortion	20 years each	
	49-83	Labor payments	6 mo. each (consec. to each other; conc. to Ct. 1)	
	210, 211	Filing False Tax returns	2½ years each (consec. to each other; conc. with Ct. 2)	$5,000

THOMAS BUZZANCA (10 years; $5,000; 73 cts.)	1	RICO	10 years	$5,000
	2	RICO Consp.	10 years	
	14-48	Extortion	10 years each	
	49-83, 84	Labor payments	3 mo. each (consec. to each other; conc. to others)	
VINCENT COLUCCI (5½ years; $5,000; 12 cts.)	1	RICO	5½ years	$5,000
	2	RICO Consp.	5½ years	
	3-6, 13	Extortion	5½ yrs. each	
	8-11	Labor Payments	1 year each (consec. to each other; conc. to all others)	
	212	Filing false Tax returns	3 years	
CAROL GARDNER (10 years; ($5,000; 13 cts.)	1	RICO	10 years	$5,000
	2	RICO Consp.	10 years	
	3-6, 13	Extortion	10 years each	
	8-11, 85	Labor payments	1 year (consec. to each other; conc. to all others)	
	213	Filing false Tax returns	3 years	
MICHAEL COPOLLA (13 years; 1 ct.)	2	RICO Consp.	13 years	
GERALD SWANTON (5 years; $5,000; 60 cts.)	87	Extortion	5 years	$5,000
	88-142	Extortion	5 years each	
	196-199	False Statements	5 years each (conc. to each other)	

Appendix B—Opinion of the District Court (S.D.N.Y. October 11, 1979)

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MICHAEL CLEMENTE, et al.,

Defendants.

S 79 CRIM 0142 (LBS)

APPEARANCES: (See last page)

SAND, D.J.

The issue before this Court arises under Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §§

1961-68 (1976), the anti-racketeering statute commonly known as RICO.[1] Counts I and II of the indictment herein are based on §§1962(c) and (d), respectively. Section 1962(c) provides that

> "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . "

Section 1962(d) makes it unlawful for any person to conspire to violate §1962(c). Defendants now renew their motion, previously denied by this Court, to dismiss Counts I and II (hereinafter cited as "the RICO counts").

We deal here with allegations of a pattern of infiltration and corruption of otherwise legitimate enterprises by a criminal venture consisting of a group of individuals allegedly associated for the purpose of engaging in various criminal activity. Citing the recent Sixth Circuit decision in *United States v. Sutton,* Nos. 78-5134-5-6-7-8-9-41-2-3 (6th Cir. Sept. 4, 1979), the defendants contend that the "enterprise" specified in §1962 signifies only the legitimate enterprises, *e.g.*, the International Longshoremen's Association ("ILA") or waterfront related entities such as Quin Marine Services, Inc. ("Quin Marine"), a marine service and repair company. The Government, however, argues that the "enterprise" specified in §1962 can be construed to refer to the criminal conspiracy by which the legitimate entities were infiltrated and corrupted.

We again deny defendants' motion to dismiss the RICO counts.

Appendix B—Opinion of the District Court (S.D.N.Y. October 11, 1979)

I. BACKGROUND

A. The Indictment

RICO counts I and II name defendants Michael Clemente, Tino Fiumara, Thomas Buzzanca, Vincent Colucci, Carol Gardner and Michael Coppola. The indictment alleges that defendants Clemente, Fiumara, Buzzanca, Colucci and Gardner occupy, or had occupied, important executive-level positions in various locals of the International Longshoremen's Association, that they were controlling figures with respect to waterfront related businesses, or that they were associated with such persons. Defendant Copolla is alleged to have been an associate of Fiumara.[2]

Seeking to track the language of §1962(c), the Government contends in Count I that the defendants:

> "being persons employed by and associated with an *enterprise,* to wit, a group of individuals associated in fact to corruptly control and influence the waterfront industry in the Port of New York and other ports in the Eastern United States and to enrich themselves and their associates, which *enterprise* was engaged in and the activities of which affected interstate and foreign commerce, unlawfully, wilfully and knowingly did conduct and participate. directly and indirectly, in the conduct of the affairs o' such *enterprise* through a pattern of racketeering activity, which included among other things, acts of extortion in violation of Title 18, United States Code, Sections 1951 and 2, and receipt of unlawful payments in violation of Title 29, United States Code, Section 186(b), and Title 18, United States Code, Section 2." (Emphasis added).

Count II similarly invokes the concept of criminal "enterprise", charging that the defendants:

Appendix B—Opinion of the District Court (S.D.N.Y. October 11, 1979)

> "unlawfully, wilfully and knowingly would and did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, to wit, to conduct and participate, directly and indirectly, in the conduct of the affairs of an *enterprise* engaged in and the activities of which affected interstate and foreign commerce through a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962(c)." (Emphasis added).

The Government alleges that the defendants utilized their positions and power derived from their involvement with the ILA and specified employers in the construction and maintenance business, to achieve their illegal purposes. The Government, however, alleges that the "enterprise" which they were "employed by and associated with" and in the conduct of whose affairs they engaged in a pattern of racketeering activity was not the union or the waterfront related entities, but the illegal conspiracy itself.

B. The Initial Motion

In their initial motion for dismissal of the RICO counts defendants challenged the Government's theory that for purposes of a RICO prosecution, the racketeering "enterprise" referred to in §1962 may be the criminal venture itself as distinguished from an existing legitimate enterprise which has been infiltrated and corrupted by that criminal venture. The Government opposed defendants' motion, noting that the Second, Fifth, Seventh and Ninth Circuits had explicitly rejected defendants' argument that §1962 does not apply to illegal enterprises.[3] See Government's Brief at 55. In our opinion of July 30, 1979, we denied defendants' motion to dismiss the RICO counts.

Subsequently, the Sixth Circuit Court of Appeals in *United States v. Sutton, supra,* rendered an opinion which squarely conflicts with the precedents upon which the

Government had relied in opposing defendants' motion. After analyzing the legislative history and purposes of the RICO statute, the *Sutton* court concluded that §1962 may not be "applied to persons engaged in racketeering activity unrelated to any legitimate organization but in furtherance of something the Government terms 'a criminal enterprise'." *Id.* at 2. The Court thus dismissed substantive and conspiracy RICO counts which were predicated on the notion of "criminal enterprise." In light of the *Sutton* opinion, defendants have renewed their motion that this Court dismiss the RICO counts, arguing that the holding and rationale of the Sixth Circuit decision requires such action because the "enterprise" referred to in those counts of the indictment falls outside the ambit of §1962.

II. Discussion

In *United States v. Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied sub. nom. Napoli v. United States,* 429 U.S. 1029 (1977), the Second Circuit held that §1962(c) applies to all enterprises, including criminal enterprises. Since we believe *Altese* to be controlling here, we are constrained to deny defendants' motion to dismiss the RICO counts. The Court notes that after defendants renewed their motion in light of *Sutton,* we suggested at oral argument that the Government might deem it prudent to obtain a superseding indictment.[4] As indicated below, such an indictment would lie here and would be consistent with both *Altese* and the Sixth Circuit decision. The Government has heretofore declined to seek such an indictment.[5]

Even if it be assumed, *arguendo,* that *Sutton* ultimately becomes the law of this Circuit, the indictment before us does not appear on its face to suffer from the defects which caused the reversals in *Sutton* of all convictions on all counts on grounds of misjoinder. Rule 8(b), Fed. R. Crim. Pr. In *Sutton,* the Court concluded that

without the benefit of the "criminal enterprise" concept and the RICO counts, there was no requisite nexus among defendants and offenses such as would justify defendants' joint trial on the remaining counts. By contrast, even absent the RICO counts involved here, the remaining allegations in the indictment present a coherent picture of the defendants, who by dint of their employment or association with the ILA, were able to conduct or participate, directly or indirectly, in the conduct of the ILA's affairs through a pattern of racketeering activity, which included acts of extortion and receipt of unlawful payments. Alternatively, the indictment can also be viewed as depicting defendants, who by dint of their employment or association with waterfront related companies such as Quin Marine, were able to conduct or participate, directly or indirectly, in the conduct of the affairs of those companies through a pattern of racketeering activity.[6]

The allegations in the indictment as just described point to the conclusion that the significance of whether the *Altese* or *Sutton* conception of enterprise is controlling is, in this case, as it appears from the face of the indictment, a matter more of form than substance.

As the case before us is constituted, the evidence and proof needed to obtain convictions on an indictment for which the enterprise is a criminal conspiracy would appear to be interchangeable with the evidence and proof needed to obtain convictions where the enterprise is a legitimate entity such as the ILA or Quin Marine.

III. Conclusion

Sutton deals with a fact pattern not involving legitimate enterprises.[7] Thus, *Sutton,* though triggering defendants' renewal of their motion and this Court's reconsideration of the question, is not apposite. The case before us differs from *Altese, Sutton* and indeed all other

Appendix B—Opinion of the District Court (S.D.N.Y. October 11, 1979)

RICO decisions in which the "enterprise" concept has been in issue because in those earlier cases, the "criminal enterprise" theory was the only basis for the invocation of the RICO statute.[8] None of those cases considered whether the "criminal enterprise" concept was available to the Government in a situation in which legitimate enterprises were also involved. It is, of course, one thing to conclude that a criminal conspiracy will suffice as the "enterprise" under §1962 when there is no alternative if the statute is to apply; it is quite another proposition to hold that the RICO statute affords the Government a choice in pleading between pre-existing legitimate enterprises and a criminal conspiracy.[9] As we have already noted, however, with respect to the case before us, insofar as it appears from the indictment on its face, the significance of the choice is more a matter of form than of substance.[10] In any event, we are constrained to adhere to *Altese* and thus to deny defendants' motion to dismiss RICO Counts I and II.

SO ORDERED.

s/
U.S.D.J.

Dated: New York, New York
October 11, 1979

Appendix B—Opinion of the District Court (S.D.N.Y. October 11, 1979)

FOOTNOTES

1. "RICO" is an acronym for "Racketeer Influenced and Corrupt Organizations," the heading for Chapter 96 of Title 18 of the United States Code, §§1961-1968 (1976).

2. The Grand Jury indictment, S 79 Cr. 142 (LBS) charges that:

"1. MICHAEL CLEMENTE, the defendant, formerly an official of Local 856, International Longshoremen's Association (hereinafter sometimes referred to as "ILA") Manhattan, New York, is, and was, by position, influence and reputation a controlling figure with respect to waterfront businesses and officials of the ILA.

2. TINO FIUMARA, the defendant is, and was, by position, influence and reputation a controlling figure with respect to waterfront related businesses and officials of the ILA.

3. THOMAS BUZZANCA, the defendant, from on or about December, 1976 to the date of filing of this indictment is, and was, President, Locals 1804 and 1804-1, ILA, 403 Greenwich Street. New York, New York; organizer, ILA, 17 Battery Place, New York, New York; and from at least January 1, 1975 to December, 1976, was business manager, Local 1804-1.

4. VINCENT COLUCCI, the defendant, is, and was, President and Secretary-treasurer, Locals 1235 and 1478-2, ILA, 30 Hennessey Street, Newark, New Jersey; from at least October, 1976, organizer, ILA, 17 Battery Place, New York, New York, and Vice-president, Atlantic Coast District, ILA, 17 Battery Place, New York, New York;

5. CAROL GARDNER, the defendant, is, and was, President, Local 1233, ILA, 731 S. 10th Street, Newark, New Jersey; and organizer, ILA, 17 Battery Place, New York, New York; and from 1973, an organizer of and from October, 1976, Vice-president, Atlantic Coast District, ILA, 17 Battery Place, New York, New York.

* * *

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7. MICHAEL COPOLLA, the Defendant, is, and was, an associate of TINO FIUMARA, the defendant."

3. For a discussion of prior cases, see page (iv) n. 8, *infra.*

4. For other adherents to the *Sutton* view, *see United States v. Altese, supra,* 542 F.2d at 107 (Van Graafeiland, J., dissenting); *United States v. Moeller,* 402 F. Supp. 49 (D. Conn. 1975) (per Newman, J.); *United States v. Rone,* 598 F.2d 564, 573 (9th Cir. 1979) (Ely, J., dissenting); Comment, "Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for 'Criminal Activity'," 124 *U. Pa. L. Rev.* 192 (1975).

The legislative history for the RICO statute suggests that in situations such as those now before us involving the infiltration and corruption of legitimate organizations by criminal activities, Congress may have intended "enterprise" to mean legitimate enterprise. Thus, the Senate Report indicates that Title IX "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. 91-617, 91st Cong., 1st Sess. (1969). Senator John McClellan, the principal legislative sponsor for the Organized Crime Control Act of 1970, stated in his discussion of the RICO provisions:

> "[T]itle IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains." 116 Cong. Rec. 591 (January 21, 1970).

See also, McClellan, "The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?," 46 *Notre Dame Lawyer* 55, 140-146 (1970).

Similarly, Representative Poff, the floor manager of the House bill, advancing an interpretation of Title IX consistently put forth in Congress, commented:

> "Perhaps the single most alarming aspect of the organized crime problem in the United States in recent years has been the growing infestation of racketeers into legitimate business enterprises . . . Title IX of S. 30 provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped and the process reversed when such infiltration does occur." 116 Cong. Rec. 35, 925 (Oct. 7, 1970).

See also 116 Cong. Rec. 607 (remarks of Sen. Byrd, indicating that Title IX "would create strict criminal penalties for using the proceeds of racketeering activity characteristic of organized crime to acquire an interest in business engaged in interstate commerce, or to acquire or operate such businesses by racketeering methods"); *id.* at 953 (remarks of Sen. Thurmond); *id.* at 3264 (remarks of Sen. Dole). For House statements, *see* 116 Cong. Rec. 35, 196 (remarks of Rep. Celler, stating that RICO "is designed to inhibit the infiltration of legitimate business by organized crime"); *id.* at 35,200 (remarks of Rep. St. Germain); *id.* at 35,201 (remarks of Rep. McCulloch); *id.* at 35,206 (remarks of Rep. Kleppe); *id.* at 35,304 (remarks of Rep. Railsback); *id.* at 35,319 (remarks of Rep. Anderson); *id.* at 35,362 (remarks of Rep. Pepper).

5. Letter to the Court from Michael S. Devorkin, Assistant United States Attorney, September 26, 1979.

6. Further support for the notion that the case before us can be understood as one involving the infiltration and corruption of legitimate enterprises by a criminal venture is provided by the allegation of the forfeiture sought in the indictment. Thus, in paragraph 2 of the forfeiture provision, the Grand Jury charges that:

> "The defendants have *interests in unions and corporations which they acquired and maintained and through which they established, operated, controlled, conducted and participated, directly and indirectly in the conduct of the specified enterprises* through a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962, thereby making said interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)." (Emphasis added).

For examples of RICO indictments based upon the infiltration and corruption of legitimate enterprises by racketeering activity, *see United States v. Stofsky,* 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975) *cert. denied,* 429 U.S. 819 (1976); and *United States v. Field,* 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir. 1978), *cert. dismissed,* 439 U.S. 801 (1978).

7. In *Sutton,* one of the defendants was involved in a jewelry business, but the Government disclaimed reliance on that business as the RICO "enterprise" referred to in the indictment, and it appears to have played only a peripheral role in the defendants' activities.

8. Analysis of the prior cases clearly demonstrates that in those cases, unlike the present situation, there was no pre-existing "legitimate" entity whose affairs were infiltrated by the alleged criminal activity. In *United States v. Altese, supra,* no enterprise other than illegal gambling

activities was in issue. Similarly, in the Fifth Circuit decision, *United States v. Elliot,* 571 F.2d 880, 895 (5th Cir.), *rehearing denied,* 575 F.2d 300 (5th Cir.) *cert. denied sub nom. Delph v. United States,* 439 U.S. 953 (1978), the only enterprise involved an association of individuals whose purposes were to commit thefts, "fence" stolen property, traffic illegally in narcotics, obstruct justice, and engage in other criminal activities. In other Fifth Circuit cases, the sole enterprises before the courts were variously described as groups of individuals associated in order to defraud in illegal card games, *United States v. Morris,* 532 F.2d 436, 444 (5th Cir. 1976); to conduct prostitution, *United States v. McLaurin,* 557 F.2d 1064, 1066, 1073 (5th Cir. 1977) *rehearing denied,* 562 F.2d 1258 (5th Cir. 1977), *cert. denied sub nom. Hamilton v. United States,* 434 U.S. 1020 (1978); and to engage in illegal gambling, *United States v. Hawes,* 529 F.2d 472, 479 (5th Cir. 1976).

In the Seventh Circuit, the enterprise has been defined either as an illegal gambling business, *United States v. Capetto,* 502 F.2d 1351, 1355 (7th Cir.), *cert. denied,* 420 U.S. 925 (1975), or as a group of individuals associated for the purpose of defrauding insurance companies by the use of mails and committing acts of arson. *United States v. Hansen,* 422 F. Supp. 430, 433 (E.D. Wis. 1976), *aff'd* 583 F.2d 325 (7th Cir.), *cert. denied,* 439 U.S. 912 (1978).

In the Ninth Circuit, the defendants formed an enterprise in order to commit various acts of extortion, *United States v Rone, supra,* at 570.

9. The indictment suggests that the Government subscribes to the theory that it can choose between "legitimate" and "illegitimate" conceptions of enterprise. Thus, in Count 157, a separate RICO count not naming the defendants charged in Counts I and II, the Government invokes the concept of "legitimate" enterprise and

alleges that defendants Joseph Castelo and Manuel Castelo, Jr.:

> "being officers of, employed by and associated with an enterprise engaged in and the activities of which affected interstate and foreign commerce, to wit, *Castelo and Sons Ship Servicing, Inc.* unlawfully, wilfully and knowingly did conduct and participate directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity which included acts of paying and delivering and agreeing to pay and deliver unlawful payments in violation of Title 29, United States Code, Section 186(a) and Title 18, United States Code, Section 2." (Emphasis added).

10. Thus, there is no question but that federal jurisdiction over the alleged crimes is present here and that the underlying offenses are federal crimes.

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Appendix B—Opinion of the District Court (S.D.N.Y. October 11, 1979)

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Appendix C—Opinion of the District court (S.D.N.Y. July 30, 1979)

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MICHAEL CLEMENTE, *et al.*,

Defendants.

79 Cr. 142 (LBS)
#48918
OPINION

APPEARANCES: (See last page)

SAND, D.J.

It is the purpose of this opinion to rule upon all outstanding motions set forth in the defendants' Omnibus Motions other than those relating to electronic surveillance.[1]

1. Defendants Fiumara and Copolla's motion to dismiss counts 1 and 2 on the ground that 18 U.S.C. §1962 is unconstitutionally vague is denied. *United States v. Huber,* No. 79-1132, slip op. at 3924 (2d Cir. July 20, 1979).

2. Defendant Colucci moves to dismiss Counts 1 and 2 for failure to allege a "pattern of racketeering activity" with regard to him. A pattern of "racketeering activity" is defined in 18 U.S.C. § 1961(5) as "at least two acts of racketeering activity". Colucci is charged in the indictment with six acts of extortion and five acts of accepting illegal labor payments. His contention that he is charged with only one "criminal episode" and not two or more separate acts is without merit. *United States v. Moeller,* 402 F. Supp. 49, 58 (D. Conn. 1975).

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Defendant Colucci further moves to dismiss the §1962 counts on the grounds that this provision does not apply to illegal enterprises. This contention has been rejected by this circuit (*United States v. Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977)) as well as the Fifth, Seventh and Ninth Circuits; (*United States v. Morris,* 532 F.2d 436 (5th Cir. 1976); *United States v. Cappetto,* 502 F.2d 1351 (7th Cir. 1975), *cert. denied,* 420 U.S. 925 (1975); *United States v. Campanale,* 518 F.2d 352 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976)).

Colucci also argues that the indictment does not charge that the ILA is an enterprise, the affairs of which are being conducted through a pattern of racketeering. The Government responds that the "enterprise" alleged in the indictment is not the ILA but "a group of individuals associated in fact to corruptly control and influence the waterfront industry." The indictment is consistent with the Government's contention and with the applicable law. *United States v. Field,* 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd* 578 F.2d 1371 (2d Cir. 1978), *cert. denied,* 99 S. Ct. 43 (1978).

Accordingly, the Colucci motions are denied.

3. Defendants Fiumara and Copolla allege that the indictment is duplicitous in charging the substantive RICO offense, 18 U.S.C. §1962(c), and the RICO conspiracy (18 U.S.C. §1962(d)). This contention is rejected at this stage of the proceedings. See *United States v. Leo,* 406 F. Supp. 1174, 1180 (E.D. Wisc. 1976). "If each [offense] requires proof of a fact that the other does not, the [indictment is proper] not withstanding a substantial overlap in the proof offered to establish the crimes." *United States v. Smith,* 574 F.2d 308, 310 (5th Cir.) *cert. denied,* 99 S. Ct. 321 (1978), citing *Ianelli v. United States,* 420 U.S. 770, 785, n. 17 (1975). *Accord, Milanovich v. United States,* 365 U.S. 551 (1961); *United States v. DePalma,* 461 F. Supp. 778, 786 (S.D.N.Y. 1978). Violation of both 18 U.S.C.

§1962(c) and 18 U.S.C. §1962(d) are often charged in the same indictment. *See, e.g., United States v. Altese,* 542 F.2d 104, 105 (2d Cir. 1976), *cert. denied sub nom. Napoli v. United States,* 429 U.S. 1039 (1977); *United States v. Malatesta,* 583 F.2d 748, 751 (5th Cir. 1978); *United States v. Smith,* 574 F.2d 308, 310 (5th Cir.) *cert. denied,* 99 S. Ct. 321 (1978); *United States v. Frumento,* 563 F.2d 1083 (3d Cir. 1977), *cert. denied,* 434 U.S. 1072 (1978); *United States v. Scotto,* No. 79 Cr. 32 (S.D.N.Y. Jan. 17, 1979).

4. It is contended on behalf of defendant Colucci that counts 3 through 13 are multiplicitous because they charge only one continuing offense. Counts 3-7 charge Colucci and Gardner with five counts of extortion in violation of 18 U.S.C. §1951 for their receipt of five separate payments from Quin Marine Service. Counts 8-12 charge Colucci and Gardner with five counts of receiving illegal labor payments in violation of 28 U.S.C. §186(b). These counts relate to the same payments alleged in the previous five counts. However, this does not render the counts multiplicitous because each offense requires proof of a fact not required for the other. Thus, the example, under §1951 to prove the extortion the Government must establish "the wrongful use of actual or threatened force, violence, or fear, or under color of official right". An essential element of a violation of 28 U.S.C. §186 is that the payor must be an employer of union labor and the payee must be a representative of such labor. Each receipt of a separate extortionate payment and each receipt of a separate payment in violation of 29 U.S.C. §1 constitutes a separate violation and may properly form the basis for a separate count.

5. Defendants Fiumara, Copolla and Buzzanca's contention that the indictment is duplicitous because several conspiracies are alleged in count 2 is rejected. As we set forth in our July 11, 1979 opinion on the joinder motion, the indictment alleges a single conspiracy in count 2 and

the indictment's good faith allegations are controlling at this stage of the proceeding.

6. The Court finds to be lacking in merit the contentions of the Castelo defendants and Michael Clemente that the forfeiture claims should be severed or dismissed. The indictment furnishes adequate notice to these defendants. It will be for the jury to decide in a special verdict what property will be forfeited pursuant to Rule 31(c) and the jury which makes this determination should clearly be the same jury that hears the main case.

7. The defendants' motion to strike "surplusage" from the indictment are denied. The language complained of, for the most part, serves to explain the nature of the alleged relationships and how the alleged enterprise conducted its affairs. It cannot fairly be said that such matters are either irrelevant or inflammatory or prejudicial. No basis exists, therefore, to strike this language pursuant to F.R.Cr.P. 7(d).

Only one aspect of the motion to strike warrants further discussion.

Count 1, paragraph 10, reads:

> "10. It was further a part of the pattern of racketeering activity that MICHAEL CLEMENTE, the defendant, aided and abetted by others known and unknown to the Grand Jury, did obtain property from Netumar Line, to wit more than $1,000,000 consisting of yearly payments of $175,000 to $200,000, from at least 1973 through and including 1978, in order for Netumar Line to obtain certain economic benefits in connection with the operation of Pier 36, Manhattan."

The alleged $1,000,000 pay-off from the Netumar Line is not charged as a predicate offense. This does not, however, mean that the allegation is not relevant to the RICO charge. Indeed, the Government urges that:

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> "The defendants are charged with recovering payments from waterfront companies as a result of their corrupt control over the waterfront. Netumar's payments to Clemente provide a vivid illustration of that corrupt control: why else would a steamship line surreptitiously give $1,000,000 to a man who lists his only occupation as a security adviser to a Brooklyn warehouse?" Govt. Br. 77-78.

Clemente urges that the allegation has been included in order to have the jury infer "that since a great deal of money flowed to the defendant it must therefore be illegal and a violation of the racketeering acts." Victor Affidavit, Par. 13.

Obviously, this is a matter which may appropriately be the subject of a request for a cautionary instruction to the jury but it is not a concern which warrants striking of allegations which place in context and give useful background to the other allegations of the indictment.

8. We believe the thrust of defendant Clemente's somewhat obscure contention that the counts relating to World Trade Transport, Inc. should be dismissed to be that he was entrapped because " . . . the government, through its agent, asked for the assistance of defendant Clemente [and] now prosecutes him for his involvement in a government enterprise." Clemente Br. pp. 40-41. Entrapment is a question for the jury and Clemente's assertions do not furnish a basis for dismissal of the relevant counts.

9. We have considered and find no merit in the following additional contentions of various defendants:

(A) that the Government improperly obtained Clemente's tax returns. The matter is governed by 26 U.S.C. § 6103(h)(3)(A).

(B) that the consensual recordings should be suppressed because of non-compliance with the Attorney General's regulation requiring advance authorization of such recordings. Memorandum of the Attorney General dated Oc-

tober 16, 1972 to the Head of the Executive Departments and Agencies Re: Monitoring Private Conversation with the Consent of a Party. Defendants Clemente and Buzzanca argue that the consensual recordings made by John Marano and William Montella should be suppressed on this basis. The Government asserts (Devorkin Affidavit Par. 25-27) that there was in fact full compliance with the Attorney General's directive. Even were this not the case, *United States v. Caceres,* 47 U.S.L.W. 4349 (April 3, 1979) would be apposite here and precludes suppression;

(C) the request by defendant Gardner for an evidentiary hearing concerning the circumstances surrounding his May 25, 1978 testimony before the Waterfront Commission of New York Harbor. Affidavits of the Assistant United States Attorney (Devorkin Affidavit Par. 34) and of personnel of the Waterfront Commission negate Gardner's claim that the Commission was somehow acting as a "front" for the United States.

It appears that the Government was not even aware of Gardner's appearance until almost a month after it took place. No other valid basis for an evidentiary hearing on this issue has been presented.

Accordingly, defendants' motions are denied to the extent set forth herein.[2]

SO ORDERED.

s/
U.S.D.J.

Dated: New York, New York
July 30, 1979

FOOTNOTES

1. The Court will hold a hearing on August 1, 1979 on certain aspects of defendants' contentions relating to eletronic surveillance.

On July 11, 1979, this Court denied defendants' motions relating to misjoinder and for severance.

On July 20, 1979, defendants' motions for additional particularization of the Government's case were also denied.

We will also deal in a separate opinion with claims asserted by the Castelos of grand jury abuse since this issue was the subject of additional briefing following the return of the superseding indictment.

2. Insofar as defendants have moved for production under F.R.Cr.P. 16 for *Brady* material and "3500" material, the Court believes that many of these issues have been subsequently resolved and asks that it be specifically advised in writing within ten days from the date hereof of the open issues with respect to document production requiring judicial resolution.

Appendix D—Statutory Provisions

1. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, provides in pertinent part:

§1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186

(dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

***

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

***

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for pur-

poses of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustained and the cost of the suit, including a reasonable attorney's fee.